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THE PROPOSED ABOLITION OF THE ORIGINAL SIDE OF THE HIGH COURT

BY

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It is disclosed from the proceedings of our local Legislative Council that there is a proposal to abolish the Original Side of the Madras High Court and that the matter is under consultation with the Honourable Judges. It is sad to contemplate that this institution with over eighty years of glowing history and tradition and which always has been inspiring the respect and confidence of the lawyer and the litigant should be thought fit to be lopped off as if it were an unnecessary or superfluous limb of the administration of justice. Under the Letters Patent of Queen Victoria, the three High Courts were established in Madras, Bombay and Calcutta with Original Side jurisdiction; it was even then recognised that the traditions, customs, manners, methods of business of big commercial organisations with direct contact with foreign firms with their own law merchant of an international nature and other conditions obtaining in these three important sea-coast capitals of the three big Presidencies needed a different manner of administration of justice from that of the other parts of the country. In recognition of this aspect we have in India, a Presidency Towns Insolvency Act, a Provincial Insolvency Act, a Presidency Small Cause Courts Act, a Provincial Small Cause Courts Act, a City Municipal Act and a District Municipalities Act. Even under the Transfer of Property Act, the mortgage by deposit of title deeds has been recognised in the City to meet business requirements. Things are not altered today to justify a levelling up of these two systems and on the other hand the attraction of the people being now more towards cities, the present system may have to be rigidly maintained and if need be extended to other growing cities. The Original Side of the High Court is a court of record. Besides its civil, criminal, testamentary, matrimonial, admiralty and ecclesiastical jurisdictions, it has an extraordinary jurisdiction by which it can transfer to itself any case from other parts of the Province when in the interests of justice it is found necessary, and within our memories such instances have taken place. Under the Original Side Rules the machinery is provided for cheap and expeditious disposal of commercial causes and procedure, such as Originating Summons, Garnishee Summons and Third Party Procedure, have been evolved to enable parties to obtain directions, without recourse to costly legal proceedings. It has practically an exclusive jurisdiction in Company matters and the applications of a complex nature such as writs disposed of by the Judges on the Original Side cannot be handled so effectively by inferior Courts. It has certain powers, privileges and prerogatives to issue writs in matters of *Habeas Corpus*, *Certiorari*, *Quo Warranto*, *Mandamus*, etc. There is a dignity and prestige about it which make the people confident of its inviolability and feel a sense of security of their rights. The framers of our Constitution have recognised this fact and they have preserved intact all the powers of

the High Courts and all its privileges and prerogatives as the High Courts are the guardians and protectors of the fundamental rights of the people. There seems to be no substantial reason to abolish the Original Side and such an attempt has been disapproved by eminent leaders of the Bar like Mr. T. R. Venkatarama Sastriar and Sir Tej Bahadur Sapru. The Madras Advocates' Association unanimously pleaded in one of the resolutions at a special meeting that the Government should at least defer this reform until all the High Courts discuss it on an All-India basis. It behoves our Honourable Judges, many of whom are from the Bar, and some with original side experience, also to bestow thought before they make their recommendations on this question.

It may be that the Government is prompted by a desire to effect reduction of expenses to the litigant or to economise the judicial administration. In view of the ever-increasing court-fees and stamps on documents, one is led to infer that the Government is not kind-hearted to the litigant. The *ad valorem* fee levied under the Court-Fees Act, especially in this Province, is shockingly excessive as pointed out by Sir Lionel Leach in his farewell address to the Madras Bar and to the several Bar Associations in the country. And again, the Stamp Act has been amended so as to step up the duty on transfers, although the avowed policy of the law is to encourage transfers of property to be made freely. One may venture to suggest that the object of the State should be to dispense justice on favourable terms to the litigant and not to rackrent the latter with a view to earning revenue for ideological experiments. The cost of litigation on the Original Side of the High Court is cheaper than in the other civil Courts. Let us take suits the values of the claims of which are Rs. 5,001, 10,000, 15,000, 20,000 and 50,000 respectively.. The fee on plaints payable are as follows :

Claim.	*Fee payable in O. S.*	*Fee in other Courts.*
Rs. 5,001	Rs. 240-0-0	Rs. 412-7-0
10,000	265-0-0	712-7-0
15,000	290-0-0	937-7-0
20,000	315-0-0	1,162-7-0
50,000	465-0-0	1,762-7-0

The court-fee in the muffassil is under the Court-fees Act and the fee payable in the High Court (O. S.) is Rs. 225 for the first sum of Rs. 2,500 and Rs. 5 for the remaining Rs. 1,000 or part thereof. About twenty years ago the fee in the Original Side on plaints of any value even a crore of rupees was a flat rate of Rs. 30 only. It was subsequently raised to Rs. 100, then to Rs. 150 and then to the present scale. The process and application fees are higher in the Original Side. The fee for each summons including lodgement in Sheriff's office is Rs. 4. On interlocutory applications, it is Rs. 5 for Judge's Summons and Rs. 10 for a Notice of Motion. There is also a first hearing fee of Rs. 10 for Settlement of Issues and the Hearing fee for each day of trial is Rs. 20. The fee on each exhibit filed is Rs. 2 but in the case of an agreed set of documents a fee of only Rs. 2 need be paid as on one exhibit and this is justified because the time of the Court is not taken in examining the documents in original. There is not much difference in the scale of battas paid to witnesses. If a suit is referred to the Official Referee for taking accounts as in Partnership or Partition actions a hearing fee of Rs. 20 should be paid each day. The fee allowed to the legal practitioners is now practically the same in the City as in the muffassil. The frightening itemised bills of the attorneys have now vanished. With all these higher scales the cost of litigation is cheaper in the Original Side than in the other Courts and the higher the claim, the cheaper it is in the former. A system of low filing fee and a graduated scale of hearing, and exhibit fees is likely to be less harsh on the litigant and will have some relation to the time and trouble taken by the Court in the disposal of cases.

Suppose in the suits referred to above there are two defendants in each, that each trial lasts two days, that ten exhibits are filed in each suit by one party and there

are four Judges' Summons and one Notice of Motion. The total cost of all these will be about Rs. 100. Even so the litigant pays less here than in the muffassil. Let us also suppose that these suits being either Partnership or Partition actions, are referred to the Official Referee and that the trial in each case lasts five working days. The fee payable to this Court will be Rs. 100 in each case and even in the muffassil à party has to pay a commissioner who may be appointed for this purpose. The fee allowed to the advocate in the above suits will be Rs. 350, Rs. 650, Rs. 850, Rs. 1,050 and Rs. 1,650 respectively in the High Court, Original Side and in the muffassil Rs. 350, Rs. 600, Rs. 800, Rs. 1,000 and Rs. 1,600. If all these items are added up it will be seen that the litigation in the Original Side of the High Court is cheaper than in other Courts of the Province and more so where the claim is higher. Further, on the Original Side of the High Court there is this advantage, namely, as cases are once posted in the final list they are tried day by day and the clients can be sure when their cases will be heard and when they will be over instead of going to Courts on several adjourned days only to be told of further adjournments which are usually in the intervals of one or two months.

The Original Side of the High Court has on its files even after the jurisdiction of the City Civil Court was raised to Rs. 5,000 about 500 to 600 civil suits per year on the average and in addition to this there are suits in its Testamentary, Matrimonial and other jurisdictions and as usual very heavy matters under Insolvency and Company Law and other Special Acts which require special handling. There is also the criminal jurisdiction and in every quarterly sessions about 12 to 15 calendar cases are disposed of. If all this volume of work is delegated to an inferior Court or Courts there will be a need for not two but four or more judges to cope with the work which will undoubtedly increase as time goes on owing to the extension of the city, its ever growing population and ever expanding business and industrial enterprises.

On the question whether the Government can effect any economy in the judicial administration by this reform, it is difficult to say anything until the proposed machinery to take over the functions of the Original Side of the High Court is known. A District Court has to be created in any case under the Civil Courts Act and if this Court is to exercise all the several jurisdictions of the Original Side there must be at least two judges on the higher cadre and also two or three in the lower to cope with the work now done by the Master and the two Registrars which are applications on procedural matters, settlement of issues, stamp references, passing of accounts of receivers and and liquidators, taking security, execution matters, taxations, etc. It may be found necessary to create more than one Subordinate Judge's Court as in any other District and divide the work between the District and Subordinate Courts, invest them with different pecuniary jurisdictions and in other ways to see that all the work that is now done by the Original Side of the High Court is fully carried out. In that case the question arises as to what is to be done with the existing City Civil Court. Is it to be made a Subordinate Judge's Court or abolished ? Probably the substituted machinery may not be effective but more complicated. It is worthwhile to point out that after careful investigation the Bombay Ministry has constituted City Civil Courts in Bombay modelled on the Madras Act and have vested them with original jurisdiction up to Rs. 10,000. If ours is a model, why should it be destroyed ?

In the event of the proposed reform being implemented, the staff of the Origina Side may be entirely assimilated in the new Court or Courts and the only saving effected may be in the salaries paid to the judges and other officers. In the Original Side of the High Court, the salaries of the two judges, the Master, the Official Referee, the Crown Prosecutor and the two Assistant Registrars come to about Rs. 11,500 a month and the salaries of the new judges in the District and Subordinate Courts, the sheristadars and the additional officers may be between Rs. 6,000 to Rs. 7,000 and it may be that after all this trouble, the Government may be saving the salary of one High Court Judge.

The only substantial advantage to the Government may be an increase in Court-fee revenue by the *ad valorem* scale of the Court-Fees Act coming into operation but it cannot be said that this is economising. It rather looks like profiteering and one may venture to ask is not revenue from litigation as obnoxious as that from drink according to our idealogics ? So it was to advanced thinkers in the West, and it is well to remember that both in Conservative England and Communist Russia there is nothing like this rackrenting of the litigant in the name of court-fees. If the scale of court-fees prevalent in the Original Side is considered low it may be slightly levelled up, while at the same time the taxation of the moffussil litigant is lightened. Similarly, if it is considered that the work of the High Court is increasing on the Original Side that may be a good ground for raising the jurisdiction of the City Civil Court to Rs. 10,000 as in Bombay. But the Original Side should be preserved as a model and inspiration to the Judges, lawyers, and litigants alike. It is hoped that the Government and the High Court will consider this question in all its aspects, bearings and repercussions and drop it as it is an unnecessary measure.

"AGRICULTURAL LEASES IN MALABAR—NOTICE TO QUIT"

BY

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May I, with respect, point out a misconception that seems to linger in the mind of the writer under the above caption in (1948) 2 M.L.J. (Jour.) 1 in regard to one aspect of the decision in *Narayanan Nair* v. *Kunhan Mannadiar*[1].

In the 2nd paragraph of his article the learned writer observes " It is to be observed that the case before the learned judges did not really fall under section 14 of the Malabar Tenancy Act, for although eviction was claimed by the landlord on the ground of non-payment of rent (ground No. 3 of section 14) it *was found as a fact* that the first defendant who was the representative-in-interest of the lessee had sub-leased one out of the four items of the property in the suit to defendants 6 to 12, and as he was not cultivating the whole holding, *he was clearly not a ' cultivating verumpattomdar '* entitled to claim fixity of tenure under section 10."

If by this statement it is meant to suggest that the finding italicised above was accepted by the Division Bench which decided the Letters Patent Appeal, I beg leave to point out, with respect, that it is a misconception. A perusal of the judgment of the Division Bench would show that it did not address itself at all to the main question whether a cultivating verumpattomdar does or does not cease to be such on sub-leasing a portion of his holding. As one who had something to do with the conduct of the case, may I say that the *ratio decidendi* of the Division Bench ruling was this : assuming, but not deciding, that a cultivating verumpattomdar ceases to be such on sub-leasing a portion of his holding, a suit for eviction of such a person cannot be maintained under the Malabar Tenancy Act ; but only under the general law of landlord and tenant, and under that law a notice to quit is indispensable. This reasoning of their Lordships had direct relation to a specific ground about notice to quit which was for the first time raised in Letters Patent Appeal, as will appear from the judgment. No doubt, in considering the question, their Lordships made observations that even a suit for eviction under section 14 must be preceded by a notice to quit. But it is not to be supposed that the main question that called for determination in the case, namely whether a cultivating verumpattomdar does or does not cease to be such on sub-leasing a portion of the holding, has behind it the warrant of a Division Bench ruling. Their Lordships did not address themselves at all to this question which had been fully considered by Shahabuddin, J., from whose judgment the letters patent appeal was preferred, and which was decided only on the question of the need for a notice to quit.

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1. (1947) 2 M.L.J. 559.

SUMMARY OF ENGLISH CASES.

Re MILES AIRCRAFT, LTD., (1948) 1 Ch. 188 : (1948) 1 All.E.R. 225 (Ch.D.).

Companies Act (1929), *section* 173—*Pendency of petition for winding up—Application for order that certain dispositions of property of the company made on the day after the presentation of winding up petition be not void—Sustainability.*

The object of section 173 of the Companies Act (1929) is that if a winding up order is made, any transaction which has been entered into since the commencement of the winding up (the date of the presentation of the petition) is subject to review by the liquidator. On general principles unless there is in progress a winding up by the Court, the Court cannot make any order under section 173 of the Companies Act as to the validity of any disposition of the company's property made after the presentation of the winding up petition. The matter must be left to the liquidator after his appointment. It cannot be said that there is a winding up in progress when the winding up petition is not yet disposed of. For, if the petition is withdrawn or ultimately dismissed, there never will have been a winding up by the Court. If the petition results in a winding up order, it will be for the liquidator to deal with the matter as he thinks proper.

WRIGHT *v.* BENNETT, (1948) 1 All.E.R. 227 (C.A.).

Practice—Frivolous and vexatious action—Second action for conspiracy based on same facts as in prior action for fraudulent misrepresentation and negligence—Abuse of process—Striking out action—Inherent jurisdiction.

Successive actions in respect of the same set of facts would be an abuse of the process of Court and must be set aside as frivolous and vexatious.

The plaintiff who had purchased some property subsequently sued the vendor and the land agent for damages for fraudulent misrepresentation and negligence respectively. Having failed in the action he again commenced a second action setting up in substance the same story against the defendants but alleging fraudulent conspiracy as the cause of action.

Held, that whether or not a plea of *res judicata* will inevitably succeed, the cause of action as alleged in the two actions strictly speaking being not the same, proceeding with the action will be an abuse of process of Court and the defendant's application for striking out the pleading should succeed.

Re WINGHAM, (1948) P. 138 : (1948) 1 All.E.R. 208 (P.D.A.).

Will—Soldier's will—When privileged—" Actual military service "—If includes training in operational duties.

The testator entered the Royal Air Force in February, 1940. In October 1942, he was sent to Canada for training in operational duties. On March 1, 1943, while stationed at North Battleford, Saskatchewan, he executed a will which did not comply with the provisions of the Wills Act. On August 11, the deceased met his death while flying on duty in Canada in the course of his training for operational duties.

Held, he was not " in actual military service " within the meaning of section 11 of the Wills Act and was not entitled to make a privileged will. What amounts to " actual military service " discussed.

UNIVERSITY OF CALCUTTA NOT TO BE REMOVED DEPARTMENT OF LAW

HILL *v.* BUTTERLEY CO., (1948) 1 All.E.R. 233 (C.A.).

Workmen's Compensation—Accident to workman on his way to "clock in" before starting work—If in course of employment—Public allowed to use pathway where accident occurred—Effect.

Before reaching the place of work to which the workman was proceeding for "clocking in" before starting work the workman slipped on the ice in the pathway and was injured. The pathway though private and not a thoroughfare was allowed to be used by the public by employer.

Held, the workman was entitled to compensation as the accident must be deemed to have occurred in the course of his employment. The risk cannot be said to be identical with the risks incurred by members of the public in a public street as in an ordinary street accident.

Re COGHILL, DRURY *v.* BURGESS, (1948) 1 All.E.R. 254.

Will—Construction—Codicil exonerating "all persons from repayment of moneys owing to me at the time of my death"—Only unsecured debts excused thereby.

By a codicil the testatrix declared "I exonerate all people from the repayment of moneys owing to me at the time of my death" The codicil was drawn up without any professional assistance by the testatrix herself. On a construction of the will,

Held the testatrix meant to forgive personal debts and did not mean to give up securities for money. Accordingly secured debts were not forgiven.

HARDING *v.* PRICE, (1948) 1 All.E.R. 283 (K.B.D.).

Crimes—Mens rea—*Failure of motor car driver to report accident of which he had no knowledge—If offence—Road Traffic Act* (1930), *section* 22 (2).

Where the driver of a vehicle to which a trailer was attached did not know that there had been an accident caused by the trailer colliding with another car and so, did not report the accident to a police station as required by the Road Traffic Act, he cannot be held to be guilty of an offence. The offence created by section 22 (2) of the Road Traffic Act, 1930, falls within the general rule that absence of knowledge or state of mind known to lawyers as *mens rea* affords a defence to a criminal charge.

R. *v.* SOANES, (1948) 1 All.E.R. 289 (C.A.).

Crimes—Charge of murder—Plea of guilty of infanticide—Duty of prosecution and Court.

While it is impossible to lay down a hard and fast rule in any class of case as to when a plea for a lesser offence should be accepted by counsel for the Crown—and it must always be in the discretion of the Judge whether he will accept it—where nothing appears on the depositions which can be said to reduce the crime from the more serious offence charged to some lesser offence for which, under statute, a verdict may be returned, the duty of counsel for the Crown would be to present the offence charged in the indictment leaving it as a matter for the jury, if they see fit in the exercise of their undoubted prerogative,

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to find the lesser verdict. When there was nothing disclosed in the depositions which would have justified a reduction of the charge (against a woman) from murder to infanticide, the Judge is bound to insist on the prisoner being tried for murder.

NAAMLOOZE VENNOOTSCHAP *v.* BANK OF ENGLAND, (1948) 1 All.E.R. 304 (Ch.D.)

Practice—Plaintiff residing out of jurisdiction—Order for security for costs of defendant—Such defendant also residing out of jurisdiction—If can be ordered to give security for plaintiff's costs.

It cannot be said that where the plaintiff is resident out of jurisdiction and one or more of the defendants are resident out of the jurisdiction, then notwithstanding that the plaintiff could not, in the first place, ask for an order for security for costs against the defendants, yet, if the defendants, apply for an order for security, it is only equitable that the plaintiff should himself be given an order against the defendants for security for costs. In the case of a foreign plaintiff, the order is made to give some modicum of protection to the defendant, whether he be resident within, or out of jurisdictions in case the action should fail. On the other hand, a man should not be compelled to provide security for costs as the price of defending himself and his rights, unless the defendant is in substance in the position of a plaintiff: (1891) 3 Ch. 458, considered.

LP2356.

DENNIS *v.* LONDON PASSENGER TRANSPORT BOARD, (1948) 1 All.E.R. 779 (K.B.D.)

Tort—Tramcar running into ambulance car and injuring an attendant—Claim by injured against owners of tramcar for damages—Amounts paid as pension and sick allowances to plaintiff by his employers—If to be included in the damages.

The plaintiff was employed by the London County Council as an ambulance attendant. A motor ambulance in which he was travelling was run into by a tramcar belonging to the defendants and he was injured as a result of the negligence of the driver of the tramcar. In a claim for damages,

Held, a wrong doer is not to be allowed to reduce damages for loss of wages by the fact that other persons had made up to the plaintiff his wages—his own employer paying pension and sick allowance equal to wages which he was morally bound to repay if he recovered damages.

R. *v.* NOWELL, (1948) 1 All.E.R. 794 (C.C.A.).

Criminal Trial—Driver of motor car charged with being drunk—Consenting to examination by police doctor after being told by him that it may be to his advantage—Evidence of police doctor as to his drunken condition—Admissibility.

The appellant was seen by the police officers to drive his car on the wrong side of the road and without lights at night. He appeared to be drunk and the officers took him to the police station and the person in charge of the station on being told of the charge informed the appellant that a doctor would be sent for to examine him. A police doctor attended and examined the appellant and certified that owing to his consumption of alcohol, he was in an unfit state to drive a motor car and was properly charged with the offence. He allowed himself to be examined after the doctor explained that it might be in his own interest. In a prosecution of the appellant,

Held, the words of the doctor cannot be regarded as an inducement to do something so as to bring into operation the law which excludes confessions made as the result of persuasion, promises or threats. The evidence of the doctor whether he be police surgeon or any one else should be accepted as the evidence of a professional man giving independent expert evidence with no other desire than to assist the Court.

Re Fox, (1948) 1 All.E.R. 849 (Ch.D.).

Bankruptcy—Goods in possession of bankrupt—When available for distribution among creditors on the principle of reputed ownership.

The conditions essential to the operation of the " reputed ownership " section of the Bankruptcy Act are that the true owner of the goods should, by leaving them in the possession, order or disposition of the bankrupt, put him in a position by means of them to obtain false credit. It is not, of course necessary to show that the bankrupt has, in fact, obtained false credit by means of the goods. He will in effect, be presumed to have done so at the expense of the general body of creditors if the circumstances in which he is in possession are such as must necessarily lead persons dealing with him to believe the goods are his. Unless the true owner judged on the footing that knowledge must be imputed to him of the necessary consequences of his acts, can be shown to have been guilty of some remissness in this respect, the section cannot be brought into operation against him. He is not to be deprived of his goods merely because an inference that the bankrupt is the true owner may arise. In such a case any one giving credit to the bankrupt on the footing that the goods were the bankrupt's property would be the victim of his own carelessness in making an unwarranted assumption and not any remissness on the part of the true owner.

(Case-law reviewed).

Brooks *v.* Prescott, (1948) 1 All.E.R. 907 (C.A.).

Practice—Discovery and production of documents—Action against police officer for damages for false imprisonment and assault—Police officer's note book if can be ordered to be produced.

In an action against police officers for damages for assault and false imprisonment the plaintiff is not entitled to have discovery of the note books of the police officers, where such documents related solely to the defendant's own case and not to the case of the plaintiff and did not in any way tend to support the plaintiff's case or impeach the defendant's case.

Case-law reviewed.

R. *v.* Beamon, (1948) 1 All.E.R. 947 (C.C.A.).

Criminal Trial—Detention in Borstal school—Consecutive sentences—Propriety.

It is not the right practice to pass consecutive sentences of Borstal detention. Such consecutive sentences though they may not be bad in law, are undesirable because they make the scheme of Borstal training unworkable.